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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1064

JACK B. KREMENS, *Individually and as Hospital Director of Haverford State Hospital;* FRANK S. BEAL, *Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania;* WILLIAM B. BEACH, JR., *Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania, Appellants*

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND, *Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated, Appellees*

MOTION TO AFFIRM

On Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM

On Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania

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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the grounds that the questions involved are so unsubstantial as not to need further argument, that the decision

below is obviously correct and that there is no conflict of opinion among the courts on the federal questions involved.

QUESTIONS PRESENTED

1. Was the District Court correct in holding that parents, guardians and persons in *loco parentis* who seek mental commitment of their juvenile wards cannot waive the rights of these juveniles to substantial procedural protections prior to involuntary indeterminate institutionalization?

2. Did the District Court abuse its discretion in requiring the defendant state officials to assure that juveniles, presently committed, receive constitutional state procedures to determine whether they are mentally disabled and in need of institutionalization?

3. Does the District Court's requirement of constitutional state procedures for juveniles, presently committed, violate the Eleventh Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Appellees do not defer to the appellants' statement of the case because it is incomplete and fails to describe both the extensive factual basis for the District Court's opinion and order, and the legal grounds upon which the District Court rested its decision.

On November 16, 1972, plaintiffs filed this class action against state officials challenging those portions of Pennsylvania mental health statutes which permit the state to detain persons eighteen years of age or younger in mental institutions without substantial procedural protections including, *inter alia*, notice, counsel and opportunity for hearing. "In essence, plaintiffs claim that the present procedures do not adequately assure against the mistaken commitment of children who are not mentally ill." District Court Opinion, A.J.S.[1] at 25a-26a; 402 F. Supp. at 1042-1043.[2]

A three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284 and, prior to trial, extensive factual stipulations were entered into. At a three day hearing before the three judges, the testimony of six expert psychiatrists was taken and depositions of three additional expert psychiatrists were admitted into evidence.

On July 24, 1975, the District Court issued its opinion, one judge dissenting, and requested the parties to submit proposed implementation orders. (A.J.S. at 51a). The District Court considered these proposals and submitted to the parties for comment a proposed order of its own. After further comment (including a statement by the Court Administrator of Pennsylvania) and modification, a final

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1. Appellants' *Appendix to Jurisdictional Statement* is abbreviated herein "A.J.S." Citations are to page numbers.

2. For convenience, all references to the District Court's reported opinion include the official citation thereof, 402 F. Supp. 1039 (E.D. Pa. 1975), in addition to reference to the *Appendix to Jurisdictional Statement*.

order was adopted unanimously by the three-judge court. (A.J.S. at 97a, *et seq.*)

The Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P.S. §§4402, 4403, provides that persons eighteen years of age or younger may be institutionalized—without counsel or opportunity for hearing—simply upon application of a "parent, guardian or person in loco parentis."[3] The named plaintiffs were each involuntarily committed under the challenged statutory provisions.

Juveniles are committed to mental institutions in Pennsylvania for a wide variety of behaviors. The District Court found:[4]

> Class members have also been committed to mental hospitals for running away, robbing a gas station, stealing in general, chasing and striking a girl, arson, delinquent behavior in general, truancy, physical ailments such as colitis and weight loss, school phobia, and drug overdose.

(A.J.S. at 29a); 402 F. Supp. at 1044. One retarded person was institutionalized for "rage reactions during which he attacked others" and another for being a "management problem." *Id.*

Conflicts within families were also found to be the basis for institutionalization. For example, Plaintiff L. L., who was 15 years old when committed, came from a troubled family situation; the District Court found:

3. See text of statutes at A.J.S. at 23a-24a, n. 2; 402 F. Supp. at 1041-1042, n. 2. The application must be accepted by the facility. 50 P.S. §4401. After this action was filed, the defendants adopted certain regulations with regard to these statutes. A.J.S. at 25a-26a, n. 5; 402 F. Supp. at 1042-1043, n. 5.

4. These factual findings were based upon "summaries contained in the final pretrial order which have been stipulated to and on" one of appellants' exhibits. A.J.S. at 27a; 402 F. Supp. at 1043. Only selected representative examples of the District Court's extensive and consistent findings will be given here.

> Her difficulties in relating to her mother resulted in her commitment. Hospital records show that she threatened the lives of her mother and sister and that she has a personality disorder. Her parents are divorced and her father is remarried, living in Florida. At the time of her commitment and the time this action was filed, she would have preferred to have been with her father and when she is with him her behavior is excellent.

(A.J.S. at 28a); 402 F. Supp. at 1044. A "poor family situation" where the "mother of the child did not get along well with the child" resulted in the commitment of one retarded person; another was institutionalized "because the child interfered with the routine of the household and disturbed family members." (A.J.S. at 29a); 402 F. Supp. at 1044.

In its detailed and well-reasoned opinion, the District Court determined that "the state is required to provide substantial procedures when there is the possibility of erroneously and wrongfully depriving persons of their liberty by committing them to mental institutions." (A.J.S. at 32a); 402 F. Supp. at 1045 (citations omitted). The stigma and incarceration associated with mental commitments were found to command the observance of due process. Recognizing that "[i]n deciding to institutionalize their children, parents, as well as guardians ad litem or persons standing in loco parentis, may at times be acting against the interest of their children," the District Court held that parents "may not effectively waive personal constitutional rights of their children." (A.J.S. at 36a-37a); 402 F. Supp. at 1047-1048.

Balancing the competing interests of the plaintiffs and the state, the District Court held that, before they may be institutionalized, plaintiffs and their class are entitled to "(1) a probable cause hearing within seventy-two (72) hours from the date of their initial detention; (2) a post-commitment hearing within two (2) weeks from the date of their initial detention; (3) written notice, including the date, time, and place of the hearing, and a statement of the

grounds for the proposed commitment; (4) counsel at all significant stages of the commitment process and if indigent the right to appointment of free counsel; (5) be present at all hearings concerning their proposed commitment; (6) a finding by clear and convincing proof that they are in need of institutionalization; (7) the rights to confront and to cross-examine witnesses against them, to offer evidence in their own behalf, and to offer testimony of witnesses." (A.J.S. at 49a-50a); 402 F. Supp. at 1053 (footnote omitted).[5]

The District Court declared the challenged statutory provisions unconstitutional and enjoined their enforcement.

5. The court noted that it did not "intend nor expect that all of these procedures will be required every time an attempt to institutionalize a child is made." (A.J.S. at 50a), n. 26; 402 F. Supp. at 1053. With the exception of the rights to notice and counsel, these rights may be waived by the child (or, in some specified circumstances, by counsel) upon approval by the unbiased tribunal. *Id.*

THE QUESTIONS ARE INSUBSTANTIAL

I. The District Court Was Correct in Holding that Parents, Guardians and Persons in Loco Parentis Who Seek Mental Commitment of Their Juvenile Wards Cannot Waive the Rights of These Juveniles to Substantial Procedural Protections Prior to Involuntary Indeterminate Institutionalization.

A. *The District Court was correct in holding that the requirements of due process apply to mental commitment proceedings for juveniles.*

The challenged statutes are totally devoid of procedural protections to assure that juveniles are not erroneously committed to mental institutions. The state accepts juveniles for institutionalization simply upon application by parents, guardians and persons in loco parentis. No notice, counsel or hearing is required.[6] Confinement can last for years.

It is beyond dispute that the state must provide substantial procedures to protect persons from erroneous commitment to mental institutions:

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. Specht v. Patterson, 386 U.S., at 608, 18 L.Ed 2d 326, 87 S.Ct. 1209. Cf. In re Gault, 387 U.S. 1,

6. After this litigation was begun, the defendant state officials promulgated regulations which, only for those juveniles 13 and older, permit a hearing, but "do not provide a time by which a commitment hearing must be held. * * * With respect to children 12 years of age or younger, there is no requirement for a hearing, no less a designated time." (A.J.S. at 27a), n. 5; 402 F. Supp. at 1043, n. 5.

> 12-13, 18 L.Ed 2d 527, 87 S.Ct. 1428 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding.

O'Connor v. Donaldson, — U.S. —, 95 S.Ct. 2486, 45 L.Ed. 2d 396, 410 (1975) (Chief Justice Burger, concurring). This Court, in recent years, has consistently upheld claims by inmates of mental institutions to hearing and other procedures protective of their constitutional rights. *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).[7]

This Court's deep concern that due process be afforded to the mentally disabled is by no means newly conceived. Nearly sixty years ago, in *Chaloner v. Sherman*, 242 U.S. 455 (1917), a challenge was made to state mental incompetency procedures. Speaking for a unanimous Court, Justice Brandeis declared:

> As the plaintiff had notice and opportunity to be heard at each stage of these proceedings, the essential ele-

7. The lower federal courts have uniformly upheld the application of due process to mental commitments, mandating procedures similar or identical to those required by the District Court here. *E.g., Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) (Three-Judge Court), *vacated and remanded on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 95 S.Ct. 1943 (1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974) (Three-Judge Court); *Bell v. Wayne County*, 384 F. Supp. 1085 (E.D. Mich. 1974) (Three-Judge Court); *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975) (Three-Judge Court); *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *In Re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *In Re Basso*, 299 F.2d 933 (D.C. Cir. 1962); *In Re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971); *Sarzen v. Gaughan*, 489 F.2d 1076 (1st Cir. 1973).

> ments of due process of law were fully met, and the court had jurisdiction to enter that order.

242 U.S. at 455. See also *Dexter v. Hall*, 82 U.S. 9, 25 (1872) (". . . a lunatic needs more protection than a minor." "Both such classes of persons are regarded as under the protection of the law."); *Lynch v. Overholser*, 369 U.S. 705, 735 (1962) (federal law indicates "awareness that Congress has otherwise shown for safeguarding those suspected of mental incapacity against improvident confinement.")

It has never been held that, despite the above authority, juveniles are not entitled to a due process hearing prior to mental commitment. In fact, the cases hold that juveniles are so entitled.[8]

It is the fact of incarceration—whether for mental disability or delinquency or any other reason—which triggers the need for a stringent fact-finding process. *Appli-*

8. *Saville v. Treadway*, 404 F. Supp. 430 (M.D. Tenn. 1974), described in District Court Opinion, A.J.S. at 31a, n. 7; 402 F. Supp. at 1045, n. 7. In *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968), the Tenth Crcuit held that a nine-year old child committed to a training school for the feeble-minded and epileptic was entitled to a due process hearing similar to that required in the case at bar. See *Kidd v. Schmidt*, — F. Supp. — (E.D. Wis., August 15, 1975) (held that juvenile mental patients are entitled to preliminary injunction against parental commitment statutes).

In *Francklyn v. Sprague*, 121 U.S. 215 (1887), where a "lunacy proceeding" was brought in court against a juvenile, this Court recognized that such actions were proper:

> In Shelford on Lunacy it is said: "It seems, that a commission of lunacy may issue against an infant; but as the court of chancery has power over infant wards of court and their estates, such a proceeding seems unnecessary during the minority of the ward, except under particular circumstances when the more ample powers given in lunacy may be required for managing their estates." In Stock on Non Compos Mentis, it is also said, that, "Infancy is not a ground for withholding a [commission of lunacy], except in so far as it renders such a proceeding unnecessary, by subjecting the infant to another protective power of the Chancellor.

121 U.S. at 229 (brackets in original).

cation of Gault, 387 U.S. 1 (1966); *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). That its purpose is rehabilitative treatment does not exempt the state from the requirements of due process:

> Nor does the fact "that the purpose of the commitment is rehabilitative and not punitive . . . change its nature. . . . Regardless of the purpose for which incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken. Incarceration of adults is also intended to produce rehabilitation."

Breed v. Jones, 421 U.S. 519, n. 12 (1975), quoting with approval, *Fain v. Duff*, 488 F.2d 218, 225 (5th Cir. 1973).

B. *Parents, guardians and persons in loco parentis cannot waive the personal constitutional rights of juveniles.*

While this Court has repeatedly required that juveniles' constitutional rights be protected from infringement, former cases have usually not presented a situation where the interests of parents or guardians were aligned with the state against those of juveniles.[9] Where cases have presented such interest conflicts, this Court has held, as did the District Court here, that parents and guardians cannot act to waive or prejudice the rights of their children and wards. In *Bank of the United States v. Ritchie*, 33 U.S. 128 (1834), per Chief Justice Marshall, the Court held that a minor's guardian cannot consent, absent hearing and proof before a court, to the relief sought in a proceeding against the child. See *Hoyt v. Hammekin*, 55 U.S. 346, 351 (1852)

9. See, *e.g.*, *Haley v. Ohio*, 332 U.S. 596, 601 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962); *Kent v. United States*, 383 U.S. 541 (1962); *Application of Gault*, 387 U.S. 1 (1966); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *Goss v. Lopez*, 42 L. Ed. 2d 725, 95 S.Ct. 729 (1975).

("A guardian cannot dispose of the property of his ward without the permission of the judge of his domicil."); *O'Hara v. MacConnell*, 93 U.S. 150 (1876) (Court must assure that minor has independent representation in proceeding to deprive her of property; notice and opportunity to be heard required); *Wyman v. James*, 400 U.S. 309, 318 (1971) ("The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.")[10]

The "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare," *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944). Where, as found by the District Court, parents and guardians, in deciding to commit their children, may be acting against the interest of their children,[11] parental and governmental authority must yield to the fact-finding processes required in mental commitments by the Constitution. A child's welfare cannot always be left to a child's parents:

> Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents.

10. The earliest high court case found by counsel involving a conflict between parent and child is *Respublica v. Keppele*, 2 U.S. 197 (1793) (Pa. Sup. Ct.), where it was held that a parent could not bind a child as a servant.

This Court has had frequent experience with cases in which the property rights of minors have been protected by representation independent of the guardian. *Insurance Company v. Bangs*, 103 U.S. 435 (1380); *United States v. Dunn*, 268 U.S. 121 (1925); *Clarke v. Clarke*, 178 U.S. 186, 193-195 (1900). See also *United States v. Equitable Trust Company of New York*, 283 U.S. 738 (1931) (in lower courts, one court-appointed guardian acted to protect mentally incompetent person from actions of wife and another court-appointed guardian).

11. A.J.S. at 36a-37a; 402 F. Supp. at 1047-1048 (citations omitted).

Ford v. Ford, 371 U.S. 187, 194 (1962).

There is no way—and appellants have suggested none—in which parental waiver of a child's right to liberty[12] can be found to be an "intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), when it is the parent or guardian (together with the state) who seeks to restrict the child's liberty. See *Brady v. United States*, 397 U.S. 742, 748 (1970). See also *Massey v. Moore*, 348 U.S. 105 (1954) (waiver of rights by mentally ill person, unaided by counsel).[13]

In several important cases beginning in 1923, this Court has examined the extent to which the Constitution affects the rights of children and the triangular relationship of parent-child-state. The Court has confirmed that the Constitution protects all persons, regardless of age, and has impressed a constitutional endorsement upon the proposition, detailed above, that parental authority may be restricted for the benefit of the child. These cases do not support appellants' unprecedented claim that parental waiver is permitted.

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12. Mental commitment raises an "important question concerning every man's constitutional right to liberty." *O'Connor v. Donaldson*, — U.S. —, 45 L.Ed. 2d 396, 405 (1975).

13. Even if a parent or guardian, in this context, possesses some quantum of capacity to waive a child's rights, that waiver cannot be accomplished simply by the act of committing the child to an institution. Questions of waiver must be determined by the court:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While the accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court and it would be fitting and appropriate for that determination to appear upon the record.

Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

Meyer v. Nebraska, 262 U.S. 390 (1923), involved what the Court later called "children's rights to receive teaching in languages other than the nation's common tongue." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In *Meyer*, the Court declared the familiar principle that state interests must often yield to individual rights. 262 U.S. at 401.

Two years later, when a criminal law requiring parents to send children to public schools was challenged, it was only after noting the contention that the law violated "the right of the child to influence the parents' choice of a school," *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925), that the familiar gloss, relied on by appellants, was made that the law unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. *Id.* at 534-535. However, the possible breadth of this language in *Pierce* was substantially limited in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), when the Court upheld restrictions on the rights of guardians and approved appropriate regulation of family interests.

Ginsberg v. New York, 390 U.S. 629 (1968), is not contrary authority. First, *Ginsberg* dealt with obscenity which is *not* constitutionally protected; the liberty of the juveniles in the case at bar, on the other hand, *is* subject to constitutional protection. Second, the Court recognized the narrowness of the issue before it when it declared that it was not considering

> the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. In re Gault, 387 U.S. 1, 13.

390 U.S. at 636. Third, the Court held only that the Constitution supports the parents' "claim to authority *in their own household*" to direct the rearing of children, 390 U.S. at 639 (emphasis added); this cannot be read as authority for absolute discretion outside the household and, indeed, the Court in *Ginsberg* continued to hold that the state must

protect children from abuses. 390 U.S. at 640. Certainly, wrongful commitment is such an abuse.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1971), limitations on parental powers continued to receive approval; such regulation is proper "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." 406 U.S. at 234. The decision of the District Court that erroneous commitment of juveniles to mental institutions creates a significant social burden and can be injurious to juveniles is clearly consistent with prior decisions of this Court.

II. The District Court Did Not Abuse Its Discretion in Requiring the Defendant State Officials to Assure That Juveniles Presently Committed Receive Constitutional State Procedures to Determine Whether They are Mentally Disabled and in Need of Institutionalization.

The District Court ordered the defendant state officials to initiate procedures to assure that all juveniles committed without hearings or counsel under the unconstitutional statutes receive the benefit of "accurate fact-finding." *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971), in a state forum.[14]

Appellants' assertion that *Preiser v. Rodriguez*, 411 U.S. 475 (1972), and *Wolff v. McDonnell*, 418 U.S. 539 (1973), bar such relief is based on a misreading of those cases and a failure to note other actions of this Court which support the District Court's order.

Preiser and *Wolff* held that litigants could not obtain from the federal courts, in actions under 42 U.S.C. §1983, relief affecting "the fact or duration of confinement" or effecting "immediate or a speedier release."[15] *Wolff* noted

14. A.J.S. at 105a-106a (Paragraph 15 E).
15. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

that "an injunction restoring good time improperly taken is foreclosed" but specifically permitted federal courts to "fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled."[16]

The District Court faithfully followed *Wolff*'s proscription. It did not order "actual restoration" of liberty to plaintiffs and their class; it simply ordered that the defendant welfare department officials assure that proper state proceedings be afforded persons who had never had them. It would be in these state proceedings (not in the federal court) that commitment determinations would be made. The alternative to this orderly process would have been to allow the possibly erroneous commitment of thousands of persons to stand.

This Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), directly supports the District Court and explains the error in appellants' argument:

> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp. at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827, 36 L.Ed. 2d 439 (1973); see *Wolff v. McDonnell*, 418 U.S. 539, 554, 94 S.Ct. 2963, 2973, 41 L.Ed. 2d 935 (1934).

Id. at n. 6.[17] See *Gomez v. Miller*, 341 F. Supp. 323 (S.D. N.Y. 1972), *aff'd sub nom.*; *Miller v. Gomez*, 412 U.S. 914

16. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).
17. In *Gerstein*, as in this case, persons were deprived of their liberty for a substantial period without a probable cause hearing. The relief granted in *Gerstein*, as in this case, assured constitutional proceedings in a state forum.

(1973) (class action challenging constitutionality of pretrial confinement in state mental hospital for the criminally insane; relief sought and upheld was a state "determination of dangerousness as a prerequisite to retention").[18]

Principles of federalism were similarly respected by the District Court. No state proceedings were interfered with; in fact, the state executive, judicial and legislative branches are left free to continue commitment of juveniles, so long as the procedures used do no violate the Constitution.[19]

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18. See *Hartman v. Scott*, 488 F.2d 1215 (8th Cir. 1973); *Bradford v. Weinstein*, 519 F.2d 728 (4th Cir. 1974), *appeal dismissed on other grounds*, — U.S. —, 46 L.Ed. 2d 350 (1975); *Joyce v. Gilligan*, 383 F. Supp. 1028 (N.D. Ohio 1974); *Winegard v. State of North Carolina*, 366 F. Supp. 983 (W.D. N.C. 1973); *United States ex rel. Johnson v. Chairman of the New York State Board of Parole*, 363 F. Supp. 416 (E.D. N.Y. 1973).

Appellants' reliance on *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975), is misplaced. The case did not consider or discuss the *Preiser* issue. Also, the plaintiff mental patients in *Kendall* were incarcerated under a statute which provided for a maximum hospital term of 60 days and under which a judicial hearing and counsel were provided. Here, the plaintiffs are under an indeterminate term and have had no hearing or counsel.

Both *Lessard v. Schmidt*, *supra*, and *Lynch v. Baxley*, *supra*, provided relief for persons presently incarcerated in violation of the Constitution. Such "retrospective" application of a rule going to the heart of fact-finding procedures is proper. *E.g.*, *Kitchens v. Smith*, 401 U.S. 847 (1971); *V. v. New York*, 407 U.S. 203 (1972).

19. The defendant state executive officials were ordered to "initiate procedures;" these could include both administrative mechanisms of their own choosing as well as use of the state habeas corpus statute, 50 P.S. §4426.

The District Court, in its opinion and final order, specifically noted its deference to the principles enunciated most recently by this Court in *Rizzo v. Goode*, — U.S. —, 44 U.S.L.W. 9095 (1976). The District Court explained:

> As we have already noted, due process is flexible; the Constitution mandates no specific code of procedures. We are aware of the problems facing courts when they attempt to fashion procedures protecting language of the Fourteenth Amendment and we are sensitive to the claim that courts are

III. The District Court's Requirement of Constitutional State Procedures for Persons Presently Committed Does Not Violate the Eleventh Amendment.

The appellants argue that the District Court violated the Eleventh Amendment when it ordered[20] that persons presently incarcerated unconstitutionally be provided state procedures to determine whether they require commitment. In a two-fold analysis, appellants claim 1) that affirmative exercise of the sovereign's power is barred and 2) that the cost or providing this relief to juveniles presently incarcerated without hearings may not be imposed on the state.[21] The Eleventh Amendment dictates no such result.

The Eleventh Amendment bars suits by citizens against unconsenting states. *Hans v. Louisiana*, 134 U.S. 1 (1890). However, federal courts have undoubted authority to entertain suits against state officials where they act unconstitutionally, *Ex Parte Young*, 209 U.S. 123 (1908).

In the case at bar, the enforcement of Pennsylvania's commitment law was found unconstitutional. Therefore, appellants err in their reliance on *Hawaii v. Gordon*, 373

> "good at deciding cases, bad at drafting legislation. . . ." See, Friendly, J. "Some Kind of Hearing," supra. When presented with claims of constitutional dimension, however, we are constrained, when legislative bodies have failed to act, to find means of enforcing the constitutional rights being denied. Our action is not intended to pre-empt the state which is free to develop its own safeguards so long as they are as fully effective as those which we set out. See Miranda v. Arizona, 384 U.S. 436, 490, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966); Morrissey, 408 U.S. at 490, 92 S.Ct. 2593.

A.J.S. at 39a, n. 16; 402 F. Supp. at 1048-1049, n. 16. The legislature is free to develop an alternate constitutional system. A.J.S. at 41a, n. 18, 42a, n. 19, 100a, 101a; 402 F. Supp. at 1049, n. 18 and 1050, n. 19.

20. A.J.S. at 105a (Paragraph 15E).

21. Appellants do not assert that any of the injunctive relief granted by the District Court as to future commitments violates the Eleventh Amendment.

U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Ex Parte New York*, 356 U.S. 490 (1921); *Larson v. Domestic & Foreign Commerce Corp.*, 377 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947). In *none* of these cases did plaintiffs allege that the defendant government officials' conduct was unconstitutional.[22] None of these cases supports the broad proposition that the Eleventh Amendment bars assurance of due process fact-finding procedures in a state forum.

The District Court did not award damages or "equitable restitution" of funds from the state treasury; expenditure of state funds to implement the decree is incidental to the constitutionally mandated goal of assuring

22. An original action against the Director of the Bureau of the Budget was dismissed per curiam in *Hawaii v. Gordon, supra;* no constitutional violations were asserted.

In *Larson, supra*, this Court held that sovereign immunity barred an injunction against the Administrator of the War Assets Administration. The Court held:

> There is no claim that his action constituted an unconstitutional taking. It was, therefore, inescapably the action of the United States and the effort to enjoin it must fail as an effort to enjoin the United States.

337 U.S. at 703 (note omitted). The Court's dictum at 337 U.S. at 691, n. 11, must be read along with the text which permits restraint of "state officers seeking to enforce unconstitutional enactments."

Dugan v. Rank, supra, involved the statutory authority of federal Reclamation Bureau officials. The Court held the suit barred, noting the fact that no challenge was made to the constitutionality of the government's actions. 372 U.S. at 621-622.

A common law action of ejectment against a federal forest officer was the basis of *Malone v. Bowdoin*, 369 U.S. 643 (1962). The suit did not claim unconstitutional activities.

Ex Parte New York, supra, held that the Eleventh Amendment bars an unconsented admiralty suit *in personam* against a state.

Land v. Dollar, supra, determined that public officials could be sued when they exceed the limits of their authority.

The lower court cases cited by appellant at 25, n. 4 of their Jurisdictional Statement similarly fail to support their contentions.

that persons are not erroneously incarcerated. This Court has frequently required equitable relief having substantial fiscal impact on a state. Such impact, held *Edelman v. Jordan*, 405 U.S. 651, 667-668 (1974), is not barred by the Eleventh Amendment:

> The injunction issued in Ex parte Young was not totally without effect on the State's revenues, since the State law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in Ex parte Young. In Graham v. Richardson, 403 U.S. 365 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In Goldberg v. Kelly, 397 U.S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.[23]

23. *Ad Hoc Committee on Judicial Administration v. Massachusetts*, 488 F.2d 1241, 1243, n. 2 (1st Cir. 1973), cited for the opposite proposition by appellants, actually supports affirmative relief to remedy constitutional violations:

> Courts have not limited the Ex parte Young doctrine to "negative" relief, and have often ordered positive governmental

415 U.S. at 667-668 (note omitted). Surely "equitable restitution" of funds directly to plaintiffs, held in *Edelman* to resemble monetary damages, is a far cry from requiring compliance with procedural due process.

To the extent that the District Court determined that the protection of its order must be applied retroactively to persons presently incarcerated, it was clearly correct. See *V. v. City of New York*, 407 U.S. 203 (1972), holding *In re Winship*, 397 U.S. 358 (1970), retroactive; *Kitchens v. Smith*, 401 U.S. 847 (1971), holding *Gideon v. Wainwright*, 372 U.S. 335 (1963), retroactive, It has never been held that the cost of "truth-finding"[24] proceedings was barred by the Eleventh Amendment.

Note 23—*Continued*

action. In cases involving deprivation of constitutionally protected rights, "affirmative" relief has been granted, notwithstanding the fact that the incidental effect is that the state will be forced to expend funds from its treasury. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed. 2d 534 (1971); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); *Inmates v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973); *Martarella v. Kelley*, 349 F Supp. 575 (S.D. N.Y. 1972).

24. *V., supra*, 407 U.S. at 204, quoting *Williams v. United States*, 401 U.S. 646, 653 (1971).

THERE IS NO CONFLICT AMONG THE COURTS

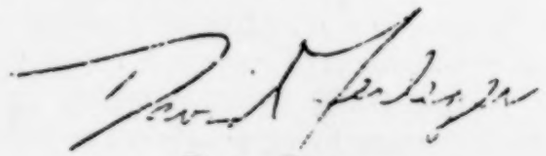
As the preceding discussion indicates, there is absolutely no conflict among the federal courts on any of the issues raised by appellants, on the merits or on the relief.[25]

A number of cases similar to the case at bar are pending in federal district courts. *E.g., Kidd v. Schmidt*, — F. Supp. — (E.D. Wis., August 15, 1975) (held that juvenile mental patients are entitled to preliminary injunction against parental "voluntary" commitment statutes) (Three-Judge Court); *J.L. & J.R., Minors v. Parham*, No. 75-163-MAC M.D. Ga.) (Three-Judge Court); *Poe v. Weinberger*, C.A. No. 74-1800 (D.D.C.) (Three-Judge Court) (class determined); *Campbell v. Director of the Michigan Department of Mental Health*, Civ. No. 572318 (E.D. Mich.) (Three-Judge Court requested); *White v. Director of the Michigan Department of Mental Health*, Civ. No. 7510022 (E.D. Mich.) (Three-Judge Court). It would be inappropriate, in these circumstances, for this Court to decide this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appellants present no substantial question for the decision of this Court and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,



DAVID FERLEGER
Counsel for Appellees

February 23, 1976

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25. The Court's attention is directed to a commentary which supports the District Court's decision on the merits. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 Calif. L. Rev.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1064

Jack B. Kremens, *et al.*,

Appellants

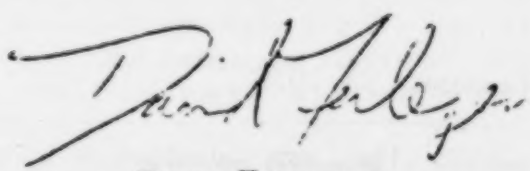
v.

Kevin Bartley, *et al.*,

Appellees

CERTIFICATE OF SERVICE

I, DAVID FERLEGER, Counsel for Appellees, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date, Friday, February 27, 1976, three copies of Appellees' Motion to Affirm to Norman J. Watkins, Deputy Attorney General, Counsel for Appellants, at Department of Justice, Capitol Annex, Harrisburg, Pennsylvania, 17120. I further certify that all parties required to be served in this appeal have been served.



DAVID FERLEGER
Counsel for Appellees